



repetitive trauma was the prevailing factor in causing his injury, medical condition and resulting disability or impairment.

Respondent requests review of whether the ALJ erred in ordering respondent to pay for the unauthorized evaluation performed by Dr. Pedro Murati.

The issues for Board's review are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of his employment?
2. Did claimant prove his alleged repetitive trauma was the prevailing factor in causing his injury, medical condition and resulting disability or impairment?
3. Is respondent liable to pay the charges of Dr. Murati as unauthorized medical when compensability was denied?

#### **FINDINGS OF FACT**

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant alleges personal injury to his low back by repetitive trauma from approximately November 1, 2012, through November 10, 2012.<sup>2</sup> He began employment as a sheet metal mechanic for the Boeing Company on October 4, 1988. Boeing was thereafter purchased by respondent. Claimant maintained his employment in the same capacity after the change of ownership.

In October 2010, claimant experienced back pain and difficulty bending while performing his job for respondent. In December 2010, when claimant was hunting, he again experienced back pain as he turned to look at a flock of geese. Claimant thought he had pulled a muscle ("something just snapped"<sup>3</sup>) and sought treatment with his family physician, Dr. Craig Parman, in January 2011. About a week after seeing Dr. Parman, claimant again experienced worsening back pain while bending at work, following which his condition became "chronic."<sup>4</sup> Over the course of approximately seven months, claimant underwent conservative treatment and diagnostic testing: "I had MRIs done, x-rays done,

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<sup>2</sup> P.H. Trans., Resp. Ex. 4 at 3.

<sup>3</sup> *Id.*, Resp. Ex. 4 at 4.

<sup>4</sup> *Id.*, Resp. Ex. 4 at 6-7.

until they finally did a diskogram and determined that there was two torn discs and that's when they set up the surgery."<sup>5</sup>

Claimant underwent surgery on October 20, 2011, performed by Dr. Camden Whitaker and Dr. Brent Lancaster. The procedure consisted of an anterior discectomy and instrumented fusion at L3-4 and L4-5.

Claimant did not pursue a workers compensation claim for the back pain he experienced in October 2010, and thereafter. Claimant's treatment, including the medical expenses relating to his surgery, was paid for under his health insurance.

Claimant was released by Dr. Whitaker to return to work part time, with temporary restrictions. Claimant's restrictions were accommodated by respondent and claimant was gradually allowed by the doctor to return to regular duty on a full-time basis. In an office visit with Dr. Whitaker on April 4, 2012, claimant reported that his back pain had improved and his lower extremity pain had resolved. Claimant testified:

Q. Okay. So how did you do when -- once you got back to eight hours a day, how were you doing?

A. I was still in a lot of pain, but I was -- you know, I was -- I attributed that to, I was working full time again, and I was working some overtime, and it was getting better slowly, but I was going to pain management and they were -- you know, I told them I was still in a lot of pain, but I was still going to work and I was able to work.<sup>6</sup>

Claimant consulted a pain management specialist, Dr. Jared Scott, on September 18, 2012. Although claimant testified he was improving and was doing "good" before his alleged repetitive trauma in November 2012,<sup>7</sup> the history claimant provided to Dr. Scott's office on September 18, 2012, varied from claimant's testimony:

At this time, Mr. Whitmer is very concerned about worsening low back pain with sitting and standing. He says that, since his surgery, and since he was last seen by Dr. Whitaker, his symptoms are really worsening, and he would like to obtain a new lumbar MRI, and this would be appropriate for us to know how to manage his symptoms with interventional procedures as well.<sup>8</sup>

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<sup>5</sup> P.H. Trans. at 8.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.*, Resp. Ex. 4 at 23-26.

<sup>8</sup> *Id.*, Resp. Ex. 2.

Claimant also reported to Dr. Scott on September 18, 2012, that he was confined to bed daily because of pain and that he was taking Soma, Endocet, Gabapentin and Oxycodone-acetaminophen.

Claimant testified that before he sustained repetitive trauma in November 2012, he was able to work a full 8-hour shift and was able to work overtime. After the alleged injury, he struggled to get through an 8-hour day and lost a number of days from work due to his lower back pain. Respondent terminated claimant's employment on February 26, 2013, and he last performed work for respondent on February 4, 2013.<sup>9</sup> Since his termination, claimant has not worked in any capacity.

Although the dates are not entirely clear from the record, it appears claimant's alleged repetitive trauma occurred in late October 2012 and early November 2012. During that period claimant's work duties changed because one of claimant's co-employees, Larry Hess, intended to take vacation leave, and claimant was directed to perform Mr. Hess' job in the latter's absence. In late October, claimant familiarized himself with Mr. Hess' job duties by working with Mr. Hess. Following Mr. Hess' departure on vacation, claimant performed the job, which, according to claimant, was more physically strenuous than the work claimant performed after his return to work post-surgically. The fill-in position required bending and crawling and claimant testified his back pain became "excruciating."<sup>10</sup>

Claimant received pain management treatment, consisting of a repeat lumbar MRI scan, medication, and epidural steroid and facet injections. The pain management treatment was initiated before the alleged repetitive trauma. Claimant testified his low back pain was worse after he performed Mr. Hess' job.

At the request of his counsel, claimant was evaluated on July 10, 2012, by Dr. Pedro Murati. Dr. Murati took a history and reviewed some medical records as part of his evaluation. However, he did not appear to have reviewed claimant's preexisting medical records, nor did he review any radiographic studies. Dr. Murati was not provided with claimant's discovery deposition. He did conduct a physical examination and diagnosed the following:

1. status post anterior lumbar interbody fusion at L3-4 and L4-5 levels-preexisting;
2. low back pain with signs of new level radiculopathy; and
3. bilateral SI joint dysfunction.

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<sup>9</sup> P.H. Trans. at 33, 35.

<sup>10</sup> *Id.* at 14-16.

In Dr. Murati's opinion, his diagnoses 2 and 3 "are within all reasonable medical probability a direct result from the work-related injury that occurred from 11-1-12 to 11-10-12 during his employment with Spirit AeroSystems."<sup>11</sup> Dr. Murati also opined "it is under all reasonable medical certainty and probability that the prevailing factor in the development of [claimant's] conditions is the multiple repetitive traumas at work."<sup>12</sup>

Dr. Paul Stein was appointed by the ALJ to perform a neutral medical evaluation. Dr. Stein reviewed claimant's medical records, including preexisting records, claimant's discovery testimony, and imaging studies. The studies reviewed by Dr. Stein included lumbar MRI scans conducted on January 28, 2011, and November 5, 2012. Dr. Stein took a history and performed a physical examination on September 16, 2013. Dr. Stein authored a narrative report to the ALJ in which he concluded:

Although Mr. Whitmer may be having more pain at this time than prior to November of 2012, there is no documentation of a structural change in the lower back and he has not developed any new areas of symptomatology, only complaints of increased pain in the previously symptomatic region. To the extent that his condition today is worse than prior to November of 2012, the work activity would represent an aggravation of the preexisting and already symptomatic condition. The primary and prevailing factor is still the preexisting condition.<sup>13</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2012 Supp. 44-501a(b) and (c) provide:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides in part:

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<sup>11</sup> P.H. Trans., Cl. Ex. 2 at 3.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*, Resp. Ex. 1 at 7.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

### **ANALYSIS**

The undersigned Board Member interprets the ALJ's Order as finding claimant's claim is not compensable based on the "prevailing factor" opinion of the neutral physician, Dr. Stein.

This Board Member finds claimant did not sustain his burden to prove he sustained personal injury by repetitive trauma rising out of and in the course of his employment, nor did he prove that his alleged repetitive trauma was the prevailing factor in causing claimant's medical condition and disability or impairment. The reasons for these findings are:

1. Claimant's testimony and the histories he provided to the medical providers demonstrate that he experienced only a worsening or aggravation of his preexisting low back pain following his alleged repetitive trauma.

2. Claimant's job duties in late October and early November 2012, may have served to aggravate claimant's preexisting low back pain. However, assuming there was an aggravation, claimant's claim is not compensable solely because there was an aggravation of a preexisting condition.

3. The opinions of Dr. Stein are more persuasive than the opinions of Dr. Murati because:

A. Dr. Stein reviewed claimant's prior medical records. Dr. Murati did not.

B. Dr. Stein reviewed a number of imaging studies, including lumbar MRI scans conducted before and after the alleged repetitive trauma.<sup>14</sup> Dr. Murati reviewed no x-rays or MRI scans.

C. Dr. Stein reviewed claimant's discovery testimony while Dr. Murati did not.

D. Dr. Murati's diagnoses are not supported by the other medical evidence. Dr. Stein did not diagnose SI joint dysfunction or radiculopathy at L5-S1.

E. Dr. Stein's opinions are not entitled to greater weight solely because he was appointed by the Court, however, his status as a neutral physician is material to assessing his credibility.

4. Claimant has not proven he sustained an "injury" or "personal injury" as those terms are defined in the New Act.

5. Dr. Stein's opinions support the conclusion that the prevailing factor causing claimant's injury, medical condition and disability or impairment was claimant's preexisting condition, not the alleged repetitive trauma.

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<sup>14</sup> Dr. Stein found there was no significant difference between the two MRI scans.

Respondent raises the issue of whether the ALJ erred in awarding claimant \$500 unauthorized medical compensation for Dr. Murati's evaluation. At a preliminary hearing, an administrative law judge has the authority to award medical compensation, including unauthorized medical, but such authority must be based "[u]pon a preliminary finding that the injury to the employee is compensable. . . ." <sup>15</sup> The Board has jurisdiction of this issue because "it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing." <sup>16</sup>

Once the ALJ denied TTD and medical treatment on the basis that the claim was not compensable, the ALJ exceeded his authority in awarding compensation of any nature, including unauthorized medical. Accordingly, that part of the preliminary hearing Order that awards claimant \$500 unauthorized medical for Dr. Murati's examination is vacated.

### **CONCLUSION**

This Board Member finds:

1. Claimant did not sustain personal injury by repetitive trauma arising out of and in the course of his employment.
2. Claimant did not prove his alleged repetitive trauma was the prevailing factor in causing his injury, medical condition, and resulting disability or impairment?
3. Under the circumstances of this claim, respondent is not liable to pay the charges of Dr. Murati as unauthorized medical.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. <sup>17</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order. <sup>18</sup>

**WHEREFORE**, the undersigned Board Member finds that the October 2, 2013, preliminary hearing Order entered by ALJ Thomas Klein is vacated to the extent that claimant is awarded unauthorized medical compensation, but is affirmed in all other respects.

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<sup>15</sup> K.S.A. 2012 Supp. 44-534a(a)(2).

<sup>16</sup> K.S.A. 2012 Supp. 44-551 (i)(2)(A).

<sup>17</sup> K.S.A. 2012 Supp. 44-534a.

<sup>18</sup> K.S.A. 2012 Supp. 44-555c(k).



**IT IS SO ORDERED.**

Dated this 9th day of January, 2014.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

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Honorable Thomas Klein, ALJ